SIR WILLIAM SCOTT, LORD STOWELL

JUDGE OF THE HIGH COURT OF ADMIRALTY, 1798–1828

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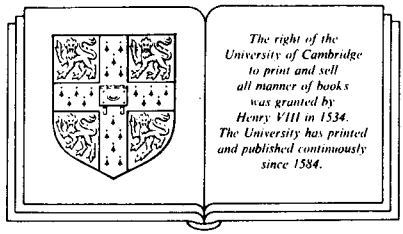

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SURVEY OF ENGLISH ADMIRALTY JURISDICTION: HOW DID IT VANISH?

If one were to reflect on the possible functions of a court with special expertise over maritime problems, one would probably surmise that such a court could be used in three broad areas: to settle the many and varied disputes which arose out of the commercial carriage of goods by sea; to reduce friction with foreign princes by adjudicating conflicts which grew out of the capture or plunder of the ships of other states especially in time of war; and to try, convict and sentence individuals for crimes committed aboard ships beyond the knowledge of any jury and outside the jurisdiction of any land-based court. We shall see that the English High Court of Admiralty had jurisdiction, differing in scope from time to time, in these three general areas. Its civil or instance jurisdiction, which ebbed and flowed with the royal favor and support, focused on the wide variety of disputes of the shipping industry, for example, cases involving chartering of vessels, contracts for carrying cargo, seamen's wages, collisions, supplies and repairs to vessels and disputes between part owners of vessels. Its prize jurisdiction concerned the legality of the capture of vessels and cargoes belonging to persons from other countries and the division of these spoils. Its criminal jurisdiction extended the king's peace to the high seas by punishing acts of piracy, homicides, assaults and other crimes committed on English ships at sea. Parliament could, of course, give the court other power, for example, hearing appeals from colonial vice-admiralty courts.

Long before there was an admiral or an admiral's court for the whole of England, local officials, known as keepers or wardens (*custos*), had discharged some of the duties later within the admiral's reach. In the twelfth century the Cinque Ports were organized and received special royal privileges. This confederation of ports provided the king with ships for service in the navy. By the fourteenth century the loose organization of these southeast fishing ports had already lost

its *raison d'être* and its value to the king. Perhaps the Cinque Port system provided the model for the creation of other keepers appointed elsewhere in the thirteenth century. Before the creation of the office of one admiral for all England, admirals of the north, south and west were appointed with authority over the fleets and with functions similar to those of the keepers. These local coastal officials had responsibilities for preservation of peace at sea, for restricting piracy and capture of vessels belonging to foreigners and especially for the care for wrecks on the coast. In the sixteenth century vice-admirals, appointed for one or more counties, were expected to control pirates, impress seamen, enforce embargoes and inventory captured or wrecked ships. As late as the seventeenth century, some of these local officials obtained exemptions from the lord admiral's jurisdiction and were granted jurisdiction over such admiralty matters within their ports and coastal areas. These franchises, whether exempt from the admiral's power or as his subordinates, were viewed primarily as private sources of profit derived especially from wrecks. The local keepers or vice-admirals had strong incentives to connive with pirates and to engage in wrecking and pillage, whereas only a few inadequate means existed to rein in their greed. Where judicial authority was exercised by these vice-admirals or wardens, it appears that eventually a right of appeal to the High Court of Admiralty would lie. Compiled lists show that vice-admirals continued to exist in the eighteenth and even in the nineteenth centuries.[1]

The title admiral first appears in 1295, but the admiral's functions did not at first include the power to hear pleas and administer justice. These judicial roles are not mentioned till the mid-fourteenth century. Apparently the office of admiral was created largely in response to the complaints by foreign sovereigns about the piracies and spoils committed at sea and the frustrations of the injured parties when they sought justice in English courts. Prior to the creation of an admiralty court, matters such as piracy, spoil of wreck, capture of royal fish or obstruction of rivers were dealt with by a confusing array of tribunals: by the common law courts, or by the Chancellor or the King's Council, or by arbitration. Common law juries often showed local prejudice in favor of the native parties, even if the accused happened to be a pirate. The admiral probably did not receive authority to hold

[1] R. G. Marsden, 'The vice-admirals of the coast', *E.H.R.*, 22 and 23 (1907, 1908), 468–75, 736–57; 6 Wm IV c. 76; K. M. E. Murray, *The constitutional history of the Cinque Ports* (Manchester, 1935), 1–8, 205–30.

an independent court until after 1340. Prior to that time several English kings had claimed sovereignty of the sea, but had been unable to end the stream of complaints against English seamen for committing acts of piracy. Attempts at arbitration of claims made by the French, the Flemish and others had apparently not solved the problem. Edward III, therefore, extended the power of the admiral, which previously had been mainly disciplinary and administrative, so that the admiral could act in a judicial capacity and provide justice in piracy and other maritime cases. But even in the fifteenth century the English Crown had to confront the disastrous international consequences of lawless acts of piracy committed by English subjects.[2]

By 1360 the admiral's jurisdiction clearly included the power to hold pleas. Previously there had been several admirals, with disciplinary power for a particular expedition or a particular part of the fleet. In 1360 the entire fleet was entrusted to one admiral, whose patent contained a broad and ill-defined grant of maritime jurisdiction, with full power

> of hearing plaints of all and singular the matters that touch the office of the admiral and of taking cognisance of maritime causes and of doing justice and of correcting and punishing offences and of imprisoning [offenders] and of setting at liberty prisoners who ought to be set at liberty and of doing all other things that appertain to the office of admiral as they ought to be done of right and according to the maritime law.[3]

The admiral also had authority to appoint a deputy, probably a judge for the newly created court.

A new court obviously needed some rules to guide its procedures and decisions. Apparently not long after the admiralty court began functioning, some individuals interested in the work of the court, perhaps officials of the court, began compiling materials which eventually became the *Black book of the admiralty*. The *Black book*, which in its final form dates from the fifteenth century, contained administrative regulations for the admiral and the fleet. It also gathered together whatever rules could be found for practice before the court, with clear influence from continental civil law practice. The *Black book* likewise contained earlier compilations of maritime law

[2] *Select pleas in the court of admiralty*, ed. R. G. Marsden (2 vols., London, 1892, 1897) (Seld. Soc., vols. 6 and 11), I, xi–xl; S. P. Pistono, 'Henry IV and the English Privateers', *E.H.R.*, 90 (1975), 322–30.

[3] *Select pleas*, I, xlii–xliii.

used in the ports of Europe and England. The Laws of Oleron, dating from the early thirteenth century and incorporated into the *Black book*, provided rules concerning the powers and liabilities of the master of a ship, the rights and responsibilities of the mariners, the rights and duties of shippers of cargo, charterers and owners of ships and pilots, and the liabilities in case of damage to cargo or collision. The Laws of Oleron had to be supplemented as maritime commerce expanded and these additional articles were also included in the *Black book*. The *Black book* provides convincing evidence that those involved with the admiralty court soon recognized the need to settle the uncertainty about questions of law and practice in a new court.[4]

It is not surprising that the procedures of the admiralty court, especially the lack of jury trial, should arouse some opposition. In 1371 Parliament received a petition complaining of the decay of the navy and of various grievances of mariners and merchants. Probably the petitioners had the admiralty court in mind when they objected that various people had been made to answer charges otherwise than upon the presentment of a jury according to the common law. The inquisition of Queenborough of 1375, which is included in the *Black book*, appears to have been an attempt to determine the maritime law to be administered in the admiralty court, perhaps in response to the complaints in the petition of 1371. Eventually Parliament acted in 1389 and again in 1391 to restrict and define the jurisdiction of the court of admiralty. The first statute provided that 'the admirals and their deputies shall not meddle from henceforth of any thing done within the realm, but only of a thing done upon the Sea', and the second was even more specific in insisting that 'of all manner of contracts, pleas, and quarrels, and all other things rising within the bodies of the countries, as well by land as by water, and also of wreck of the sea, the admiral's court shall have no manner of cognizance, power, nor jurisdiction'.[5] These two statutes must not have accomplished their purposes since in 1400 Parliament imposed a penalty, a right of action for double damages, against anyone who brought suit in the admiralty court in violation of the statutes of Richard II.[6]

Throughout the years of struggle and conflict of the fifteenth

[4] *Ibid.*, xliii–xliv; *Black book of the admiralty*, ed. T. Twiss (4 vols., London, 1871–6), I, xli–lxxi, 1–220; *H.E.L.*, 5, 120–7; T. J. Runyan, 'The Rolls of Oleran and the admiralty court in fourteenth century England', *A.J.L.H.*, 19 (1975), 95.
[5] 13 Rich. II c. 5; 15 Rich. II c. 3; *Select pleas*, I, xlvii–li.
[6] 2 Hen. IV c. 11.

century, the admiralty court remained weak and ineffective. It failed to accomplish its main purpose, reducing the conflict with foreign princes concerning piracy and spoil cases. With the accession of Henry VIII, and the expansion of foreign trade and heightened interest in exploration of the sixteenth century, the admiralty court played a larger role in determining maritime disputes. The records of the admiralty court begin in the 1520s, an indication of the new life breathed into the court by Henry VIII's interest. These early records suggest that the court's business was steadily increasing during the decades after 1520. It was not until the middle of the seventeenth century that the prize records were kept separate from the court's instance or civil records.[7]

Henry VIII intended to expand the jurisdiction of the admiralty court even beyond the limits expressed in the statutes of Richard II. After these statutes were passed, it had been the practice to include in the admiral's patent a clause expressly limiting his authority according to the terms of the statutes. Henry VIII's patents, however, contain a *non obstante* clause which was intended to override the effect of the statutes of Richard II: 'any statutes, acts, ordinances, or restrictions to the contrary passed, promulgated, ordained, or provided notwithstanding'. Other provisions in these patents likewise made clear the purpose of enhancing the jurisdiction of the admiral and his court. The patent of 1525, for instance, granted Henry VIII's son Henry, Duke of Richmond and Somerset, as admiral the power

> of hearing and terminating plaints of all contracts between the owners and proprietors of ships and merchants or between any other vessels concerning anything to be done on the sea or beyond sea, and of all and singular contracts to be performed beyond sea, contracted beyond sea, and also in England, and of all other things that concern the office of the admiral.[8]

The vast reach of power bestowed by these patents will become more apparent when considered in light of the controversies of the seventeenth century over the proper limits to admiralty jurisdiction.

The seventeenth-century furor concerning the admiralty court's jurisdiction cannot be appreciated without a fairly full grasp of the court's power under the Tudors. As already indicated, the court's work touched three different areas: the civil or instance jurisdiction, criminal jurisdiction and prize cases. The instance jurisdiction, so-called because the suit was initiated at the instance of the private

[7] *Select pleas*, I, lvi, lx–lxiii.
[8] *Ibid.*, lvi–lix.

party, not, as in criminal cases, by the government, dealt with a broad range of mercantile, shipping and commercial matters. The court apparently had exercised jurisdiction over commercial cases since the end of the fourteenth century. Henry VIII understood that the heart of maritime commerce, the carriage of goods by sea, required expeditious determination in the admiralty court of the disputes between shippers and carriers over the damage to cargo or the delay of shipping.[9] During these years of wine and roses for the admiralty court under the encouraging eye of the Tudors, the court dealt with every phase of the shipping business: contracts entered into abroad, bills of exchange, commercial agencies abroad, charter parties, insurance, average, freight, cargo damage or delay, negligence by the master, crew or pilots in navigation and breach of the warranty of seaworthiness. Collision cases were rare, but not because the court's jurisdiction over them was doubted. Not until the next century did the court clearly take jurisdiction of salvage cases, since questions of wreck were within the authority of the vice-admirals of the coast and their chief source of profit. The vice-admirals were expected to take possession of and to preserve shipwrecked goods; the salvage which the owners might pay to recover the goods was a perquisite of the admiral or vice-admiral.[10] Even without undisputed jurisdiction over salvage cases, the admiralty court during the Tudor years had wide-ranging authority over the most lucrative aspects of the shipping business, a fact which had not escaped the notice of the common lawyers.

Practice before the admiralty court was monopolized by a small group of lawyers trained in the civil law, the civilian advocates, whose university training and professional association, Doctors' Commons,

[9] 32 Hen. VIII c. 14, s. 10. Perhaps the term instance was not used until the seventeenth century. In a draft 'Digest of the law of the British courts of admiralty', written in the early nineteenth century by Alexander Croke, a civilian and judge of the Nova Scotia vice-admiralty court, the compiler gave the following impression, apparently derived from the lore of Doctors' Commons, of the source of the name of the Instance Court: 'Of the Instance Court – This is so called because suits are commenced at the instance of a private party in contradistinction from the criminal jurisdiction. Where the King or the Lord Admiral are the prosecutors ex officio[.] [A]s in the Ecclesiastical Courts causes are either *instantiae* or *ex officio*. It is therefore, properly the *civil* court in opposition to the *criminal* court but the name is extended to all proceedings in the proper, original court of admiralty in contradistinction from the prize court, which depends upon a special and distinct commission. – In the ecclesiastical courts causes are said to be in *prima instantia*, in distinction from *appeals*.' Bod. Lib. MSS Add. C. 156. Italics in the original.

[10] *Select pleas*, I, lxvii–lxx; II, xix–xxxix.

will be considered later. Proctors, generally comparable to solicitors, represented clients in maritime cases, but not in court. The practitioners in the common law courts obviously resented their exclusion from the growing number of maritime cases. The arguments of each side concerning the scope of admiralty jurisdiction will be summarized below, since they reached their high point of intensity later during the seventeenth century. The reality of the dispute, however, centered more on grasping a share of the lucrative maritime practice than on subtle jurisdictional boundaries.

Long before Lord Coke led the attack against the admiralty court's instance jurisdiction the common law courts had interfered with the admiralty court's exercise of its jurisdiction. The earliest attempts to question or curtail admiralty jurisdiction were by way of *supersedeas* and *certiorari*, issuing from Chancery. When it became obvious that resort to the Chancery usually failed to achieve the purpose of limiting the admiralty jurisdiction, common lawyers looked to the common law courts to issue writs of prohibition forbidding the admiralty judge and parties to proceed in a particular case on the ground that the matter was beyond the admiralty court's jurisdiction. The civilians, of course, opposed this power of the common law courts to issue prohibitions. They contended that where the civil law, that is the law merchant or law maritime, applied, the admiralty court had exclusive jurisdiction. The prohibitions often cited the statutes of Richard II as a basis for preventing suits from being heard in the admiralty court where the matter in issue was not 'done upon the Sea'. Many of these prohibitions were issued in cases where a contract had allegedly been entered into in London or in one of the counties. As one might surmise, most maritime contracts were entered into on dry land, not at sea. By the beginning of the reign of James I, prohibitions were issued concerning almost every subject of which the admiralty court claimed jurisdiction, including collision on a river, piracy, bottomry bonds, wreck, ownership of a vessel and even prize.[11]

The second area over which the admiralty court exercised jurisdiction, crimes committed on the high seas, attracted parliamentary attention during the reign of Henry VIII and was molded by the acts of 1535 and 1536 into the general form it would retain for the next three centuries. The admiralty court earlier had tried individuals for crimes committed at sea. The statute of Richard II of 1391 confirmed

[11] *Ibid.*, II, xli–lvii; J. H. Baker, *The reports of Sir John Spelman* (2 vols., London, 1976, 1978) (Seld. Soc., vols. 93 and 94), II, 73, 75.

and defined the landward limits of this criminal jurisdiction. The admiral's court, under that act, had cognizance 'of the death of a man, and of a maihem done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers'.[12] Most likely the admiralty court employed civil law procedure and tried accused parties without a common law jury. The petition of 1371, mentioned above, had complained to Parliament that the court made parties answer charges without presentment of a jury, apparently referring to a grand jury. The preamble to the acts of 1535 and 1536, to be discussed immediately, implied that the admiralty court did not use a trial jury in criminal cases. It seems strange, therefore, that the *Black book* speaks in a number of places of conviction by twelve men, as though a common law jury were employed at least in some criminal trials in the admiralty court.[13] The act of 1536, whether accurately reflecting actual practice in the admiralty court or not, recited that persons who committed crimes at sea often escaped punishment because the trial before the admiralty judge was 'after the course of the civil laws, the nature whereof is that before any judgment of death can be given against the offenders, either they must plainly confess their offences (which they will never do without torture or pains), or else their offences be so plainly and directly proved by witnesses indifferent, such as saw their offences committed', which witnesses, the act stated, seldom survived to tell tales of the criminal acts since pirates were shrewd enough to kill all on-lookers. Parliament, therefore, enacted that 'all treasons felonies robberies murders and confederacies hereafter to be committed upon the sea, or in any other haven, river creek or place where the admiral or admirals have . . . jurisdiction, shall be enquired, tried . . . and judged . . . as if [they] had been committed in or upon the land'. The trial, following the course of the common law, must be before the admiral or his deputy, the admiralty judge, and three or four other substantial persons appointed by the Lord Chancellor in a commission under the Great Seal. The act denied the benefit of clergy.[14] Further research would be necessary to determine whether the act correctly described the mode of criminal trial prior to the enactment. The suggestion of the use of torture,

[12] 15 Rich. II c. 3.

[13] This point was made by J. F. Stephen, *A history of the criminal law of England* (3 vols., London, 1883), II, 17.

[14] 27 Hen. VIII c. 4; 28 Hen. VIII c. 15.

though consonant with the practice of the civil law on the continent, calls for some verification from the records beyond this act, verification which has thus far not been produced.[15] As a result of this act, crimes committed at sea were thereafter tried, according to the rules of the common law, with a jury and before a special commission which included the admiralty judge and a common law judge. Some uniquely maritime flavor remained in these admiralty sessions, as, for instance, the occasional trial for piracy. The statutes of Henry VIII, however, make it necessary to view the criminal law of the admiralty court as a phase of the criminal law of England, rather than as a phase of the admiralty law.

The third area of jurisdiction of the admiralty court, prize jurisdiction, originated in the disciplinary power over seamen granted to the admirals by their fourteenth-century patents. This power was intended primarily to rid the coasts of pirates. Although there was a Royal Navy of sorts even earlier, for many centuries the king's power at sea depended much more upon privately armed vessels, the owners and crews of which sought primarily personal gain from making captures. These sea rovers, or privateers as they came to be called in the seventeenth century, cared little about legal subtleties; they were in fact barely distinguishable from pirates. It appears that by the fifteenth century it was customary for these private ships to keep the entire profit from their captures. If a capture was made by a naval vessel, the admiral and the king received a share of the prize. By the sixteenth century the admiral enjoyed a share of all captures taken by any ships under his command, probably representing the king's share of earlier days. Well into the sixteenth century the main function of the admiralty court was to assure that the admiral and the king received their proper share of the booty rather than to adjudicate nice questions of legality of the captures. Formal condemnation of prizes often was ignored before the sixteenth century; captors merely kept their prizes unless the owner complained to the king. Not until 1589 did the Privy Council order that all prizes captured be brought in for adjudication in the admiralty court.[16]

The king, thus, had conflicting interests to balance: his need to enhance the strength of his naval forces by using private ships and his

[15] J. H. Langbein, *Torture and the law of proof* (Chicago, 1976), 131, 188.

[16] R. G. Marsden, 'Early prize jurisdiction and prize law in England', *E.H.R.*, 24 (1909), 675–80; *Select pleas*, I, xl–xlii; E. S. Roscoe, *A history of the English prize court* (London, 1924), 1–11.

or his admiral's desire for a share of the property captured, and on the other hand, his desire to avoid conflicts with foreign princes over the lawless capture by Englishmen of property belonging to foreign subjects. The earliest recorded judicial proceedings before the admiral (1357) dealt with a dispute over a capture by an Englishman of Portuguese goods from a French ship. Such questions of the legality of the capture of foreign goods or vessels involved questions of state. In spite of this early indication that the admiralty court acted as a prize tribunal, for two centuries many such questions came before the Council or the Chancellor or commissioners appointed *ad hoc*, if they were adjudicated at all. In many cases which did come before the admiralty court, the Lord High Admiral, a member of the Privy Council, transmitted to the admiralty judge the petitions presented to him or to the Privy Council by the foreign party who complained of piratical attacks by English ships. The petitioning party in these spoil or depredation suits was the injured foreign party and the captor was the defendant; this distinguishes these cases from the later prize cases for which the procedures were not settled until the seventeenth century. Sometimes the judge received general instructions to do justice in the case, but at other times the admiral or the Council directed how the case should be dealt with. Since questions of state lay behind these disputes, it is not surprising that the admiralty judge frequently had little opportunity for exercising any discretion in deciding the case.[17]

Under Elizabeth I plunder at sea became a major patriotic fascination and a significant aspect of foreign policy. These sea rovers, who preyed especially upon Spanish shipping, generally carried letters of reprisal to ward off the charge of piracy. Letters of reprisal, a self-help remedy for merchants injured by foreign parties, were issued by the High Court of Admiralty in time of peace to allow the bearer to seize property belonging to subjects of a certain state in recompense for alleged injuries suffered by the bearer at the hands of that state. Reprisals at sea, with or without legal authority, had been common for centuries. The admiralty court records for the late sixteenth century included many *ex parte* proceedings called 'querelae' which founded a claim for letters of reprisal. The injured party, with supporting depositions, filed a pleading in the admiralty court alleging the loss and requesting a letter of reprisal. The court promulgated a decree

[17] *Select pleas*, I, lxv–lxvi.

stating the amount of the losses sustained and licencing the injured party to recoup his losses by force from any property belonging to individuals of the state causing the alleged injury. But proof of loss in many cases became a legal fiction; letters of reprisal were bought and sold and local admiralty officials traded these commissions in exchange for a share in the venture. The line distinguishing sea rovers from pirates was often as thin as these questionable letters of reprisal.[18]

During the Tudor period some efforts were gradually made to control the lawlessness of sea rovers. Henry VIII, by his proclamation of 1543, seemed primarily interested in encouraging private parties to arm their vessels and capture French and Scottish property. He explicitly allowed the captors to enjoy the profit of all booty. There was no suggestion that the captors had to bring the prizes to the admiralty court for adjudication. The first surviving instructions for privateers (1585), while imposing some restrictions on their behavior, did not provide for adjudication of captures. The recognizance bond for good behavior of privateers, also dating from 1585, required that the captured Spanish property must be brought to some English port before breaking bulk. The prize property was to be inventoried and appraised and the inventory and appraisal returned to the admiralty court. The instructions and recognizance showed that the chief concern was that the admiral received his tenth. Although the recognizance forbade the privateer to attack any English or friendly vessels, it did not require the captors to bring the prize before the admiralty court to determine the captor's compliance with these terms. Finally in 1589 by Order in Council, captors were directed to keep all prizes safe and not sell, spoil, waste or diminish any part 'till judgment has been first passed in the High Court of Admiralty that the said goods are a lawful prize'. After this Order, prize sentences, usually on paper not parchment, occur frequently in the admiralty court records. Not until the middle of the seventeenth century were the prize records separated from the instance records. In 1665 an Order in Council provided the basic rules for the admiralty court in the adjudication of prizes.[19]

[18] *Ibid.*, lxvi–lxviii; R. Andrews, *Elizabethan privateering* (Cambridge, 1964), 3–31; *English privateering voyages to the West Indies, 1588–1595*, ed. R. Andrews (Cambridge, 1959), 2–12, 16–28.

[19] *Documents relating to law and custom of the sea*, ed. R. G. Marsden (2 vols., n.p., 1915), I, 155–8, 236–7, 243–5, 252; II, 53–7; *Select pleas*, II, xvii; R. G. Marsden, 'Prize Law in England', *E.H.R.*, 24 (1909), 681–90.

The procedure and practice of the admiralty court in the sixteenth century has not been studied in appropriate detail. We do know that the central feature of admiralty practice was the arrest of the person of the defendant or of his goods as security to assure that the judgment could be paid. The ship of the defendant or, just as frequently, some other goods belonging to defendant were arrested at the commencement of the suit. Apparently it made no difference whether the property arrested was the subject matter of the suit or not, as long as it belonged to the defendant and was within the admiral's jurisdiction. The defendant could secure the release of the ship or other property arrested by giving bail to satisfy the judgment, but if he failed to do so, the judgment, if against the defendant, proceeded against him as well as against his property arrested. The many forms of contract used by shippers and ship owners, for example, charter parties, bills of lading and bottomry bonds, frequently contained a clause explicitly binding the ship for the performance of the contract. In other cases the parties bound themselves with sureties for the performance of the contract. In any case, if the contract was breached, the ship or other goods of the defendant could be arrested, that is, placed in the custody of the court. This reliance upon arrest of goods or upon the bail put up in place of the arrested goods provided the admiralty court with the assurance that its judgments would not be ignored, comparable to the sequestration power of Chancery.[20]

Before discussing the century of warfare between the civil lawyers and the common lawyers over the proper boundary of admiralty jurisdiction, a brief description of the civilians and their professional association will identify the less known of the combatants. The law in the admiralty court and in the ecclesiastical courts was based on the civil law and the canon law with strong influence from the Roman law tradition. Those who practiced in these courts were trained in the civil and canon law, the more proficient of whom had the degree of doctor in the civil law from one of the universities. These doctors of civil law, at the end of the fifteenth century, formed a professional association called Doctors' Commons, which was a society for the mutual benefit of the members and provided a place for lodging and eating and a library near St Paul's in London. Although there was an important educational value in the close association of a small group of individuals with the same professional interests and background, Doctors'

[20] *Select pleas*, II, lxxi–lxxii.

Commons was not intended as an educational institution comparable to the Inns of Court. The members had studied civil law at a university prior to admission to Doctors' Commons. At first some members of Doctors' Commons did not have a doctoral degree and some were trained in foreign universities. Some were clerics and some laymen, some were proctors and some advocates. By 1600 all members of Doctors' Commons were laymen, professional lawyers, and all were trained at Oxford or Cambridge and had received doctoral degrees there. The line between the functions of proctors and advocates apparently was clearly drawn sometime during the seventeenth century, and thereafter only advocates were members of Doctors' Commons, that is, only those who argued in the courts. Proctors who were not doctors in civil law continued to function in the same ecclesiastical or admiralty courts in a role, as it was finally defined, comparable to attorneys or solicitors. After the doctors were admitted as advocates in the Court of Arches, they had to maintain a year of silence during which they could not practice before the court. Obviously civilians needed families who could support them through their years of university study and during the required year of silence. Doctors' Commons was really a club of civilians, restricted to a small clique of practitioners and judges, a dozen or so at any one time, who could discuss their common problems and promote their professional learning and opportunities.[21]

By the end of the sixteenth century the civilians had become closely associated with the Crown and the Anglican Church. Being a member of the court party had advantages as long as the monarch was strong and could rule effectively; such a close association with the government was less desirable as the debates of the seventeenth century questioned precisely where sovereignty reposed in the state. Most of the courts before which the civilians practiced did not provide ample or lucrative opportunities. A list of the types of courts they appeared in, along with the other offices they filled, shows convincingly how dependent they were on the patronage of the king, the Chancellor, the admiral and the bishops. They practiced in the admiralty court, the prerogative court, the Court of Arches, the consistory courts of dioceses, the Court of Chivalry and they held a variety of offices such as diplomats, privy councillors, king's advocates, members of High Court of Delegates, chancellors of dioceses, commissaries of bishops,

[21] G. D. Squibb, *Doctors' Commons* (Oxford, 1977), 3–42. This excellent book gives a much fuller picture of Doctors' Commons.

officials of archdeacons, registrars of courts, as well as academic positions at the universities, ecclesiastical positions, deans, rectors, vicars, archdeacons and bishops. Since the practice before the ecclesiastical courts provided limited opportunities, the civilians usually accepted at least one legal, academic or ecclesiastical position to supplement their practice. When civilians became members of Parliament, they supported the interests of the king, the government and the Church. They became exponents of royalist politics, wrote political treatises and tracts, gave lectures and sermons, often upholding a broad concept of absolute royal sovereignty. Furthermore, they were viewed as custodians of religious orthodoxy, upholders of the established Church. The episcopacy controlled a majority of the positions where the civilians served, and, more important, these ecclesiastical positions provided the stepping stones to non-ecclesiastical positions in the king's service. As the crises of the seventeenth century engulfed them, as they were buffeted by the prohibitions of the common lawyers and the anathemas of the Puritans, the civilians became even more dependent on the monarch and the Church for survival.[22]

Long before James VI of Scotland ascended the English throne and before Sir Edward Coke became Chief Justice of Common Pleas, prohibitions issued by the common law courts had become a major source of controversy between the common lawyers and the civilians. Prohibitions not only called in question the most important areas of admiralty jurisdiction, they also curtailed the civilians' practice in the church courts.[23] By the reign of Elizabeth I, the tension created by these jurisdictional conflicts had become severe enough to call for an attempted settlement of admiralty jurisdiction at a conference with the common law judges before the Privy Council. The conciliar arbitration of 1575 proved to be only a temporary settlement, more properly viewed as evidence of the symptoms than a cure of the illness. The admiralty judge Dr David Lewis complained first that the finality of admiralty court judgments had been destroyed by prohibitions granted long after judgment or after sentence on appeal to the Court of Delegates, even at the request of the party who had originally

[22] B. P. Levack, *The civil lawyers in England, 1603–1641, a political study* (Oxford, 1973), 16–178. The brief summary in the text does not do justice to the full and complex argument of this book.

[23] Baker, *Sir John Spelman*, II, 66–8, 240–2; *St. German's doctor and student*, eds. T. F. T. Plucknett and J. L. Barton (Seld. Soc., London, 1974, vol. 65), 232–3, 312–13.